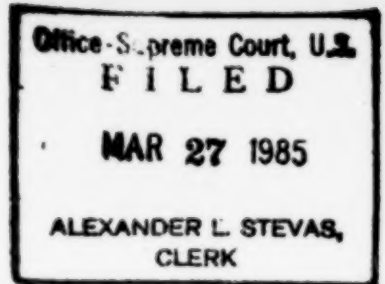


84-1531



No. \_\_\_\_\_

**IN THE SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1985**

**THE PEOPLE OF THE STATE OF MICHIGAN,  
PETITIONER**

**vs.**

**ROBERT BERNARD JACKSON,  
RESPONDENT**

**PETITION FOR A WRIT OF CERTIORARI  
TO THE MICHIGAN SUPREME COURT**

**JOHN D. O'HAIR  
Wayne County Prosecuting Attorney**

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**QUESTION PRESENTED**

SHOULD PLENARY REVIEW BE GRANTED BY THIS COURT TO RESOLVE THE SPLIT IN FEDERAL CIRCUITS AND STATE SUPREME COURTS AS TO THE CONSTITUTIONAL APPROPRIATENESS UNDER THE SIXTH AMENDMENT OF POST-INDICTMENT QUESTIONING OF THE ACCUSED BY THE POLICE, AND TO REVIEW PARTICULARLY THE HOLDING HERE BY THE MICHIGAN SUPREME COURT THAT THE SIXTH AMENDMENT REQUIRES THAT THE POLICE REFRAIN FROM ANY QUESTIONING OF THE ACCUSED AFTER THE INSTITUTION OF JUDICIAL PROCEEDINGS UNLESS THE DEFENDANT HIMSELF INITIATES THE CONTACT?

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vs.

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PETITION FOR A WRIT OF CERTIORARI

TO THE MICHIGAN SUPREME COURT

---

NOW COME the People of the State of  
Michigan, by JOHN D. O'HAIR, Prosecuting  
Attorney for the County of Wayne, EDWARD

REILLY WILSON, Deputy Chief, Civil and Appeals, and A. GEORGE BEST II, Assistant Prosecuting Attorney, and prays that a writ of certiorari issue to review the judgement of the Michigan Supreme Court entered in the above entitled cause on 29 January 1985.

#### OPINIONS BELOW

Respondent's conviction for second degree murder and conspiracy to commit second degree murder was partially affirmed by the Michigan Court of Appeals, People v Jackson, 114 Mich App 649 (1982). The Court of Appeals reversed the conspiracy count but affirmed the substantive second degree murder count. (Appendix A.)

Respondent's request for review in the

Michigan Supreme Court was granted and that court, in an opinion filed on 28 December 1984 but released on 29 January 1985, held that the respondent was entitled to a new trial because several confessions made by him were obtained in violation of his federal Sixth Amendment right to counsel. (Appendix B.)

#### STATEMENT OF JURISDICTION

The opinion of the Michigan Supreme Court was released on 28 January 1985. The jurisdiction of this Honorable Court is invoked under and pursuant to 28 USCA 1257(3).

#### CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant

v Knight, 122 MichApp 584 (1983).

The defendant made a total of seven confessions after his arrest. Three were made on the day of his arrest, of which two were tape recorded and one was oral. The following day, respondent agreed to take a polygraph. He "flunked" the polygraph and then gave a fourth statement to the examiner (oral) in which he admitted he was the shooter. A fifth (oral) and sixth statement (written) were then taken by the arresting officer. The final and seventh statement was taken the next day (taped).

The trial theory of the Petitioner, as was supported by the proofs, was that the wife of the deceased actively sought out someone to kill her husband for the reason that their divorce was imminent.

She was aware that she would receive no alimony from that divorce and that, were her husband killed prior to the divorce, she would receive substantial insurance benefits. Perry thus hired Knight and Jackson, provided a detailed description of her husband and his habits, and agreed to leave open the door between the residence address and the connected garage to ease their entry.

The deceased was killed by seven bullets, entry to the house was made through the connected garage, the murder weapon was recovered, certain stolen property was recovered, as was a letter JACKSON wrote to his girlfriend in which he made reference to "things being alright" if he had gotten a large sum of money.

Co-defendant Knight provided testimony that directly linked JACKSON to the killing, JACKSON himself confessed that he was the shooter.

#### REASONS FOR GRANTING THE WRIT

THE MICHIGAN SUPREME COURT ERRONEOUSLY INTERPRETED THE FEDERAL CONSTITUTION AND INCORRECTLY RESOLVED THE SPLIT EXISTING IN THE FEDERAL CIRCUITS BY HOLDING THAT STATEMENTS GIVEN TO POLICE BY A DEFENDANT AFTER AN ARRAIGNMENT AT WHICH COUNSEL WAS APPOINTED FOR HIM AND AFTER HE WAS PROPERLY GIVEN THE MIRANDA REQUIRED WARNINGS MUST BE SUPPRESSED FOR THE REASON THAT COUNSEL WAS NOT PRESENT PRIOR TO THOSE STATEMENTS BEING GIVEN AND BECAUSE THE POLICE DID NOT ADVISE

THE DEFENDANT OF HIS SIXTH AMENDMENT RIGHT TO COUNSEL PRIOR TO THE TAKING OF THOSE STATEMENTS.

The Michigan Supreme Court correctly noted that this defendant gave a total of seven confessions after his arrest. Three were made on the day of his arrest, of which two were tape recorded and one was oral. The following day, respondent agreed to take a polygraph. He "flunked" the polygraph and then gave a fourth statement to the examiner (oral) in which he admitted he was the shooter. A fifth (oral) and sixth statement (written) were then taken by the arresting officer. The final and seventh statement was taken the next day (taped). In their opinion, the Michigan Supreme Court held that the fourth, fifth, and sixth statements were obtained as a result of the violation of

a state "prompt-arraignment" statute. The Petitioner recognizes that this decision is not before this Honorable Court. The Michigan Supreme Court also suppressed the seventh statement based on its finding of a violation of federal constitutional precepts regarding the existence and waiver of the Sixth Amendment right extant after arraignment and appointment of counsel. This is the sole issue presented to this Honorable Court by Petitioner. Even though a re-trial of this respondent must be held, it is vital that this seventh statement be found to be admissible for the reason that in it, respondent admits that he was in fact the shooter, contrary to his earlier, admissible, statements. Thus, this petition presents a "live" issue to this Honorable Court.

The Michigan Supreme Court addressed the issue presented by respondent in his appeal in the following manner;

The...issue presented is whether statements obtained after a defendant has requested appointment of counsel at arraignment are admissible pursuant to the principles enunciated in Edwards v Arizona, 451 US 477; 101 S.Ct. 1880; 68 LEd2d 378 (1981) and People v Paintman, 412 Mich 518; 315 NW2d 418 (1982), cert. den., 456 US 995; 102 S. Ct. 2280; 73 LE2d 1292 (1982). (Slip Opinion, page 1).

The Michigan Supreme Court addressed defendant's argument that his Fifth and Sixth Amendment rights had been violated

by initially posing a series of questions:

- 1) What constitutional right(s) to counsel attached at the post-arraignment interrogations?
- 2) What right(s) to counsel did defendants invoke when they requested counsel at arraignment?
- 3) What right(s) to counsel did defendants purportedly waive prior to their post-arraignment interrogations? (Slip Opinion, page 6).

After analyzing the origin and meaning of the "right to counsel", the Court held, in answer to the first question posed, that since respondent was subjected to custodial interrogation when he

made his post-arraignment confession, his Fifth Amendment right to counsel had attached. The Court also found that since the arraignment represented the "initiation of adversary judicial proceedings", he also was "entitled to counsel under the Sixth Amendment". (Slip opinion, page 7). The Court's answer was based on the federal constitution and its interpretative case law. The Court mentioned only in passing Article 1, Section 20 of the Michigan Constitution. (Slip Opinion, page 6, footnote 14). To this the Petitioner does not disagree.

In answer to the second question, the Court held that the request to the arraigning magistrate for counsel "implicated only" defendants Sixth Amendment right to counsel. The Court recognized that respondent requested appointed

counsel only because he was "financially incapable of retaining an attorney" and was unwilling to represent himself". (Slip Opinion, page 8). To this also, the Petitioner does not disagree.

In answer to the third question, the Court found that the trial court's conclusion that respondent had never invoked his Fifth Amendment right to counsel prior to or after arraignment and had waived his Fifth Amendment right to counsel after arraignment was "not clearly erroneous". The Petitioner also agrees with this finding. The Court then noted that the issue thus became whether the waiver of the Fifth Amendment right also waived the Sixth Amendment right. (Slip Opinion, page 8). The Court found that the Sixth Amendment right was "considerably broader" than the Fifth

Amendment right and that "(n)either the United States Supreme Court nor this court has delineated specific procedural requirements for waiver of the Sixth Amendment right to counsel". (Slip Opinion, page 9). The Court then proceeded to address what type waiver is required after arraignment. The analysis used was based entirely on federal case law precedents (primairly Edwards v Arizona, 451 US 477; 101 S.Ct. 1880; 68 LEd2d 378 (1981)) and those from other states. The only Michigan case law precedent relied on, People v Paintman, 412 Mich 518; 315 NW2d 418 (1982), cert. den., 456 US 995; 102 S.Ct. 2280; 73 LE2d 1292 (1982), was itself based on Edwards, supra. The Michigan Constitution was not even mentioned in passing.

The Court noted that various federal

Circuit Courts have reached different results "both before and after Edwards was decided", citing United States v Satterfield, 558 F2d 655 (CA2-1976); United States v Mohabir, 624 F2d 1140 (CA2-1980); Blassingame v Estelle, 604 F2d 893 (CA5-1979); Silva v Estelle, 672 F2d 457 (CA5-1982); Jordan v Watkins, 681 F2d 1967 (CA5-1982); United States v Campbell, 721 F2d 578 (CA6-1983). Reference to the split within the state courts that have addressed this question was also noted. Johnson v Commonwealth, 220 Va 146, 255 SE2d 525 (1979), Cert. Den., 454 US 920, 70 LEd2d 231 (1981); State v Sparklin, 296 Or 85, 672 P2d 1182 (1983); and State v Wyer, \_\_\_ W Va \_\_\_, 320 SE2d 92 (1984).

After noting all of these precedents, the Michigan Court avered that "no con-

sistent approach to the waiver problem has emerged". (Slip Opinion, 16). The Court then held that;

We decline to follow the reasoning of those cases which have found valid Sixth Amendment waivers after a request for counsel has been made to a magistrate based solely on waivers of Miranda rights. (Slip Opinion, 18).

The Court then held however that;

We need not decide at this time whether stricter procedural standards for waiver of the Sixth Amendment right to counsel are required. We need only hold here that, at a minimum, the Edwards/ Paintman rule applies by analogy to

those situations where an accused requests counsel before the arraigning magistrate. Once this request occurs, the police may not conduct further interrogations until counsel has been made available to the accused, unless the accused initiates further communications, exchanges, or conversations with the police. If a defendant chooses to reinitiate communications, he must be sufficiently aware of both his Fifth and Sixth Amendment rights to effectuate a voluntary, knowing, and intelligent waiver of each right. (Slip Opinion, 18, emphasis in original).

Choosing to apply Edwards, supra, "by analogy" to this case, the Court then

dismissed the argument advanced by Petitioner, based on Solem v Stumes, \_\_\_ US \_\_\_, 79 LEd2d 579 (1984), that Edwards, supra, was not retroactive, by finding that this case did not involve the same Fifth Amendment question as was present in Edwards, supra, thus, its retroactive application to this case need not be addressed. The Court then promptly held that the rule established in this case would apply only to this case, to cases now on appeal which had preserved the issue, and to future cases. (Slip Opinion, 20).

It is the position of the Petitioner that the resolution of the decisional split of the federal circuits and state courts by the Michigan Supreme Court was and is incorrect. The Petitioner believes that the correct rule of law is that, as

in Edwards and Paintman, supra, where a criminal defendant requests the assistance of counsel before talking to the police, interrogation must cease and counsel must either be provided or the defendant must be shown to have both re-initiated contact and to have waived the presence of the earlier requested counsel. A mere assertion at arraignment of the desire to have state-paid defense counsel is not an assertion of the right to the presence of counsel at all further police-defendant contacts. Where the criminal defendant, after being fully advised of his Miranda rights, decides to cooperate with the police, the Miranda waiver fully supports whatever Sixth Amendment counsel right the defendant may have. As noted by the Michigan Supreme Court, "the average person" is not generally sophisticated enough to recog-

nize or understand the fine distinctions between Fifth and Sixth Amendment counsel rights. (Slip Opinion, 16). Thus, it is only logical that a defendant's awareness of his Fifth Amendment right to counsel is sufficient in and of itself to protect his Sixth Amendment rights. As also found by the Michigan Supreme Court, the record in this case establishes both that this defendant was repeatedly given his Miranda warnings and that he repeatedly waived the right to counsel enunciated in those warnings. The insertion of yet another layer of "official" advisement would thus be totally meaningless. It must also be noted that the Supreme Court itself did not set forth any specific guidance for the police as to what additional warnings they must provide after arraignment to obtain a Sixth Amendment waiver. Thus, the situation

now obtains that the police do not know what to advise the defendant of after arraignment and the defendant would not understand that additional advice even were it given.

**CONCLUSION AND RELIEF**

WHEREFORE, for those reasons presented above, the Petitioner respectfully requests that this Honorable Court either grant certiorari and hear this case or, in the alternative, summarily reverse the decision of the Michigan Supreme Court.

Respectfully submitted,

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